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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91224043
Party	Plaintiff Demeter Association, Inc.
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Date	10/06/2015
Attachments	SJ Response.pdf(155036 bytes)

UNITED STATE PATENT AND TRADEMARK OFFICE

BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Application No. 86/550,931

Trademark: BYODYNE

Services: Class 05

Published: August 4, 2015

DEMETER ASSOCIATION, INC., Opposer v. **BYODYNE, LLC,** Applicant.	Opposition No. 91224043 **OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT**

Opposer hereby responds to Applicant's motion for summary judgment (Docket No. 3). Summary Judgment is generally disfavored where the ultimate issue is whether there is a likelihood of confusion. *Fortune Dynamics v. Victoria Secret*, 618 F.3d 1025, 1031 (9th Cir. 2010). The motion should be denied for three reasons.

First, it is premature. 37 CFR § 2.127(e)(1) provides that:

> A party may not file a motion for summary judgment until the party has made its initial disclosures, except for a motion asserting claim or issue preclusion or lack of jurisdiction by the Trademark Trial and Appeal Board. A motion for summary judgment, if filed, should be filed prior to the commencement of the first testimony period, as originally set or as reset, and the Board, in its discretion, may deny as untimely any motion for summary judgment filed thereafter.

Applicant has neither filed an Answer nor served its initial disclosures. Thus, the motion should be denied. *Qualcomm, Inc. v. FLO Corp*., 93 U.S.P.Q. 2d 1768, 1769-70 (TTAB 2010).

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Second, the motion is not supported by any **evidence**. A movant must show, **based on evidence**, that there is no genuine issue of material fact for trial. The motion must be supported by record evidence "including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." Fed. R. Civ. P. 56 (c)(1)(A). Here, there is nothing in the record on which the Board could grant summary judgment **because there is no record**; there is only Applicant's argument. Because Applicant has not met its burden of making a *prima facie* case, the burden of providing a record-based response does not shift to Opposer. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323 (1986).

Third, Applicant's memorandum is substantively deficient because it does not discuss the *duPont* factors nor does it explain why, after weighing and balancing all of the factors, there is no likelihood of confusion as a matter of law. It simply discusses the channels of trade and the goods and asserts – without any evidence – that they are so different that consumers are unlikely to be confused.

In any event, the premise of Applicant's argument is fatally flawed. It argues that its goods are dietary supplements for athletes and, according to Opposer's website, its services are all about farm management and agriculture. This fundamentally misconstrues the nature of Opposer's BIODYNAMIC mark. It is a **certification mark** that is used to certify the agricultural integrity of the ingredients of the specified goods. These goods include "dietary supplements," "food supplements," "nutritional supplements," "herbal supplements," and "non-alcoholic beverage drinks." (Notice of Opposition, Exhibit 2)(Docket No. 1).[1] These are precisely the kinds of goods

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[1] The entire application/registration file is of record in an opposition proceeding. *Cold War Museum, Inc. v. Cold War Air Museum, Inc.*, 586 F. 3d 1352, 1357 (Fed. Cir. 2009).

specified in Applicant's application.[2] Based on the specifications in the registration and application, the Board cannot hold as a matter of law that they are so different that consumer confusion is unlikely irrespective of the similarity of the marks. To the contrary, the specifications cover legally identical goods.

For these reasons the motion should be denied.

Dated: October 6, 2015

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[2] This is confirmed by the photographs contained in Applicant's memorandum. The label for the YERBA MATE Biodynamic tea contains the "Supplement Facts" statement and is plainly labeled as a "dietary supplement." Applicant's label also states that it is a "dietary supplement" and it contains the "Supplement Facts" statement. (App. Mem. at 9-10)(Docket No. 3).

PROOF OF SERVICE

On October 6, 2015, I caused to be served the foregoing document described as follows:

OPPOSITION TO APPLICANT'S MOTION FOR SUMMARY JUDGMENT

on Applicant in this action by placing a true copy thereof enclosed in an envelope, postage prepaid, addressed as follows:

Cory Stenzel
BYODYNE, LLC
2113 SE Williams Drive
Gresham, OREGON 97080

Executed on October 6, 2015, at Half Moon Bay, California.